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Chairman: Mr. Daniell (Vice-Chairman) ..... (South Africa)

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In the absence of Mr. Tomka (Slovakia), Mr. Daniell (South Africa), Vice-Chairman, took the Chair

The meeting was called to order at 10.10 a.m.

Agenda item 150: Establishment of an international criminal court (*continued*) (A/AC.249/1997/L.5 and A/AC.249/1997/L.8/Rev.1)

1. **Mr. Janda** (Czech Republic) said that he welcomed the constructive spirit which had prevailed among delegations in the search for a consensus with a view to finalizing the text of existing provisions, and was pleased to note the progress achieved with respect to the definition of core crimes.

2. Defining aggression seemed to pose fewer problems than bringing such a crime under the court's jurisdiction. Adopting the statute of the court without including the crime of aggression would be tantamount to going back 50 years to the Nuremberg and Tokyo Tribunals. Given the differences in views that still existed, that issue should be referred to the diplomatic conference of plenipotentiaries for action. The debate had produced a list of general principles of criminal law and their definitions to be applied by the court; those principles should be embodied in an annex to the statute.

3. His delegation endorsed the idea of deleting draft article 22. The question of acceptance of the court's jurisdiction was also linked to the issue of preconditions for the exercise of that jurisdiction. The requirement set out in draft article 21, paragraph 1 (b), was incompatible with the principle of universality, which applied to all core crimes under international law; for that reason, it should be deleted.

4. Concerning procedural questions, a fair trial and the rights of the accused, he said that the statute should contain only basic and general provisions, while detailed rules should be included in the court's rules of procedure. As the initial experience of the International Tribunal for the Former Yugoslavia had demonstrated, that approach could have many advantages. The judges were in continuous contact with reality and could elaborate appropriate rules for the effective functioning of the court. There were frequently new situations which called for flexible rules. While the rules adopted by judges could be amended easily, it was very difficult to amend an international treaty.

5. Concerning the principle of complementarity, a proper balance must be established between the court and national authorities. Complementarity did not diminish the responsibility of States with respect to investigation and prosecution. As far as the court's jurisdiction was concerned, he disagreed with the view that as long as a national justice system investigated or prosecuted a case, the court should not be entitled to exercise jurisdiction. Such an interpretation of the principle of complementarity would seriously undermine the effectiveness of the court. The court must have a safeguard against sham national investigations and trials.

6. Concerning international cooperation and judicial assistance, which were essential for the effective functioning of the court, he said that the statute must provide for a rigorous obligation for all States parties to comply with all requests for assistance issued by the court. There must be no exceptions to that fundamental rule; in that regard, the statute should contain a provision that would prevent States parties from avoiding that obligation through the formulation of a reservation. That would be the best way of ensuring equality of obligations of States parties and preventing any interference with the effective functioning of the court.

7. There were still more or less serious differences of opinion on a number of issues. The five weeks that the Committee had left should be enough to resolve those problems, if it focused on questions which could be resolved at the expert level. It was not necessary to continue consideration at the expert level of problems regarding the role of the Security Council and the inclusion of the crime of aggression, since all the relevant arguments had been put forward. Such issues should be resolved at the diplomatic conference. In that regard, he expressed his delegation's gratitude to the Italian Government for its generous offer to host the diplomatic conference in Rome, in June and July 1998.

8. **Mr. Patriota** (Brazil) endorsed the statement made by the representative of Paraguay on behalf of the Rio Group, and said that the Rio Group offered valuable possibilities for regional coordination in addressing the many complex and sensitive issues involved in negotiations on a statute for the international criminal court.

9. The current session of the General Assembly was a milestone in the process of strengthening the international drive for a successful outcome of the Rome conference. The remaining months before the conference should be used to create a political atmosphere that was conducive to future universal acceptance of the court, which was in the interest of each individual country and of the multilateral system as a whole.

10. All countries stood to gain from the establishment of an international court which would serve as a deterrent to genocide, war crimes and crimes against humanity by building trust among nations and peoples. A universally

accepted, impartial and independent court would foster greater respect for the rule of law and would strengthen international peace and security. In order for that to happen, a proper balance would have to be achieved in certain key provisions of the statute. The idea of complementarity between national systems and the court was central to the concept of cooperation at the international level in determining individual responsibility for the most serious crimes. The court's objective should not be to replace national systems, but to establish a mutually beneficial relationship with them.

11. His delegation agreed that the future court should have inherent jurisdiction over the crime of genocide. As to other crimes, the distinction between acceptance of the court's statute and acceptance of its jurisdiction would help signatories expedite ratification procedures and promote universality. At the same time, it had been pointed out that the cumulative effect of draft articles 22 and 23 could be to ensure that the court would not be applicable to the present permanent members of the Security Council, which would be inconsistent with the widely shared objective of impartiality. It was imperative to try to resolve that issue.

12. The court's future relationship with the Security Council remained a matter of concern to many delegations. The justification for the creation of new ad hoc tribunals by the Security Council needed to be eliminated, and that required a provision such as that contained in article 23.1 in the draft by the International Law Commission. The court should not act as a subsidiary organ of the Security Council, and must aim for the highest level of judicial independence. At the same time, there must be an adequate degree of interdependence between the court, the United Nations system as a whole, and the Security Council in particular. Brazil favoured judicial independence for the court within a framework of interdependence with the United Nations, which would enable the court and the Security Council to develop a cooperative relationship in strict conformity with their respective constitutive legal instruments. The reformulation of article 23.3 proposed by the delegation of Singapore offered a way forward in the discussions on that sensitive aspect of the Statute.

13. His delegation found the draft under discussion generally acceptable. It stressed the need for the rules of procedure of the conference to be considered ahead of time, preferably during the meeting of the Preparatory Committee to be held in March/April 1998. It acknowledged the important contribution made by non-governmental organizations to the discussions on the establishment of an international criminal court.

14. **Mr. Berrocal Soto** (Costa Rica) said that his delegation fully shared the position of the Rio Group, and reiterated his Government's firm commitment to the establishment of an independent, impartial and effective international criminal court in 1998. The international community must strive to establish a mechanism for punishing those guilty of heinous crimes that shocked the conscience of mankind and to prevent such crimes being committed again.

15. Costa Rica also considered it essential that the human rights of the accused, victims and witnesses should be respected at all phases of the proceedings of the future court. It was essential that both the penalties and the procedures should be in strict conformity with the strictest international standards of administration of justice, and that special measures should be instituted to protect minors and women.

16. The list of crimes falling within the competence of the court should not be unnecessarily restricted. Costa Rica noted with satisfaction the consensus that was emerging with respect to the inclusion of genocide and crimes against humanity in the statute. It also approved the inclusion of the crime of forced disappearance and the fact that there appeared to be a definition of that offence which was acceptable to all delegations. On the other hand, it could not accept the exclusion from the court's jurisdiction of war crimes committed in internal conflicts, which were condemned in the 1997 Geneva Protocols. It believed that the future court should have jurisdiction over the crimes of international terrorism and drug trafficking, which were recognized under specific treaties. The court should have inherent jurisdiction over the crimes of genocide and aggression, war crimes and crimes against humanity in respect of all States that had ratified the statute. In addition, the States parties would have to be able to accept, by means of optional declarations, the court's jurisdiction with respect to the crimes established in other treaties.

17. Costa Rica believed that the prosecutor should be able to initiate investigations ex officio and to receive complaints from the largest possible number of sources: not only States, but also non-governmental organizations. The court should complement the legal systems of the States concerned, although that should not limit its jurisdiction in cases where those States were not prepared to dispense justice so as to protect the accused or where the proceedings were not independent and impartial. The progress made in the negotiations regarding article 35 of the statute must be acknowledged, although it would have been better to have a less restrictive text.

18. It was essential that the court should be a truly impartial body. It should be free from any political interference which would restrict its independence or threaten its impartiality. In that respect, its relationship with the Security Council was vital. The Security Council should not be allowed to exercise its right of veto over cases brought before the court. Nevertheless, certain exceptional circumstances might arise which would lead to the temporary postponement of certain cases. The powers of the Security Council in such instances must be limited solely to delaying the cases for a predetermined period through the adoption of the measures provided for in Chapter VII of the Charter. In no case should impunity be permitted, nor should the right of the victims to have recourse to international justice be curtailed. Moreover, in cases where the States concerned had not accepted the jurisdiction of the court, the Security Council might play a constructive role by exercising the powers provided for in Chapter VII of the Charter. Furthermore, the statute should make available to the Security Council a judicial instrument to which it could have recourse and which would avoid the practice of establishing new special tribunals.

19. The success of the conference of plenipotentiaries depended on the process being open and transparent and allowing the participation of all delegations, particularly those with few members. Participation of other interested bodies, for example regional human rights agencies and the members of the special tribunals, as well as non-governmental organizations, would also be appropriate. Transparency and universality were essential elements in securing the necessary political will for the establishment of the international criminal court.

20. **Ms. Flores Liera** (Mexico) associated herself with the statement made on behalf of the Rio Group. She praised the spirit of cooperation that characterized the work of the Preparatory Committee, while noting with concern that the text still contained many mutually exclusive options and regretting that there had been no qualitative and quantitative improvement in the process of reconciliation of positions. Moreover, the proliferation of informal groups within the Committee had perceptibly affected the participation of small delegations, which very often were not able to contribute to the preparation of texts. Bearing in mind the spirit of General Assembly resolution 51/207 of 17 December 1996, it was to be hoped that the Committee would be able to sort out those issues and submit to the conference of plenipotentiaries a consolidated, concrete and broadly accepted text, so as to ensure the success of the conference.

21. Her delegation attached great importance to the preparation of the rules of procedure for the conference, and was awaiting with interest the draft rules to be drawn up by the Secretariat in accordance with the practice of the codification conferences that had been held within the framework of the United Nations pursuant to recommendations of the International Law Commission. She stressed the importance of the representativeness of the officers and the drafting committee, as well as the need to promote the adoption of general agreements.

22. Mexico was especially grateful for the offer made by the Government of Italy and the steps it had been taking to prepare for the conference; the latter would, it hoped, give rise to the establishment of a universal, independent and impartial institution which, with due respect for the principles laid down in the Charter of the United Nations, would supplement national judicial systems and contribute to the strengthening of the rule of law.

23. **Ms. Betancourt-Catala** (Venezuela) said that her delegation fully endorsed the views expressed in the Committee on behalf of the Rio Group, and believed that compromise solutions should be sought that would facilitate the elaboration of a draft convention satisfactory to all delegations, lead to the adoption of an instrument whose provisions were acceptable to the members of the international community and make it possible to establish a jurisdictional body of a universal character that could carry out its functions effectively.

24. With regard to the draft statute, her delegation believed that the court's jurisdiction should be defined and determined by the court itself. Under no circumstances should the exercise of its jurisdiction depend on the decision of a political body, nor should its competence be subordinate to the action of political bodies. The court's relationship to the Security Council should be defined precisely and clearly in the statute. It should be a relationship that would enable the court to maintain its autonomy and independence without prejudice to the role of the Security Council in accordance with the Charter of the United Nations.

25. With regard to the prosecutor's role and functions in the framework of the operation of the court, her Government believed that the prosecutor should have sufficient autonomy to be able to initiate ex officio an investigation leading to an indictment. Nevertheless, such autonomy should be subject to some mechanism which could offset the possibility of such an individual having too much power.

26. With regard to the conference of plenipotentiaries to be held in Rome in 1998, the proposed duration of five weeks was sufficient to enable delegations to deliberate and

conclude their work. That implied the need for clear rules of procedure, which the Preparatory Committee should recommend to the conference for adoption. One of the main objectives which should guide the work of the Preparatory Committee and the diplomatic conference was that the court should have a universal character. To that end, it was necessary to ensure the participation of the largest number of States, both in the prior process of elaborating the draft statute and in the diplomatic conference. Her delegation expressed its satisfaction at the contributions made by a number of States to the fund established to provide assistance to and facilitate the participation of least developed countries. It also recognized that the participation of non-governmental organizations in the work of the Preparatory Committee had provided continual support and made a valuable contribution to the Committee's discussions.

27. In conclusion, she reiterated the views expressed by the Minister for Foreign Affairs of Venezuela in his recent statement to the General Assembly, to the effect that the institutionalization of a court to try international crimes against the peace and security of mankind would forestall the possibility that the victors in a conflict might be tempted to become the judges of the vanquished.

28. **Mr. Bohaievsky** (Ukraine) said that the international community had a unique opportunity to strengthen the rule of law by creating an effective judicial institution, and, in so doing, to bring the work that it had been carrying out for the past 50 years to a successful conclusion.

29. His country had always supported the idea of creating an international judicial institution that would have jurisdiction over the most serious crimes against humanity, and believed that the only way to guarantee recognition of the court's authority and status was to ensure that the relevant convention had a universal character and enjoyed world-wide adherence. For that reason, his delegation supported all measures aimed at finding a reasonable solution to a number of unsolved problems concerning the text of the draft statute, particularly in such areas as the relationship between the court and the Security Council, the role of the prosecutor and the pre-trial chamber and the definition of the crime of aggression. It also seemed logical to stipulate in the final clauses that a substantial number of ratifications would be needed in order for the convention to enter into force.

30. His Government supported those delegations which believed that the elaboration of an exhaustive list of crimes falling under the jurisdiction of an international criminal court would encourage wider acceptance of the court's statute and promote its entry into force. The court's jurisdiction should include international crimes of an exceptional character, such as genocide, aggression, terrorism, crimes against humanity and war crimes, as well as the crimes mentioned in the Convention on the Safety of United Nations and Associated Personnel. United Nations and associated personnel were often involved in situations where national criminal justice systems could not address such crimes adequately. For that reason, it was necessary to create a special mechanism to ensure the prosecution and punishment of persons who threatened the lives of such personnel.

31. The effective functioning of the court would be determined to a large extent by its relationship to the Security Council. As a political body, the Council should not intervene in the court's decisions, which would be bound by the norms of criminal justice. Moreover, any attempt to subordinate the court to the Council would be incompatible with the principles of judicial independence and impartiality.

32. His delegation was in favour of excluding the death penalty from the list of punishments to be imposed by the court. With regard to the principle of complementarity, an essential element in the establishment of an international criminal court, it believed that such a court was not intended to replace existing national criminal justice systems, but to serve in cases where national legal procedures were ineffective or unavailable. Hence, the court should not intervene, even in the case of very serious international crimes, where national judicial systems fulfilled their functions effectively.

33. The effectiveness of the work of the future court would depend not only on broad adherence to its statute, but also on the conditions under which it functioned, which must include a sound financial basis. With that in mind, his delegation reiterated its position that the court's budget should be made up of contributions from States parties. Nevertheless, it was willing to consider other proposals on that issue.

34. In conclusion, he expressed support for the speakers who had drawn attention to the question of the elaboration of rules of procedure for the conference to be held in June 1998. It would be desirable to request the Secretary-General to prepare a draft text to be discussed in the framework of an inter-sessional meeting and submitted subsequently to the Preparatory Committee for consideration in March. The Committee would then recommend the rules to the conference for adoption. It was also important to ensure the participation of non-governmental organizations, which had

contributed valuable expertise in their areas of specialization.

35. **Mr. Richardson** (United States of America), referring to the remarks made by the President of the United States to the General Assembly concerning his country's support for the establishment of a permanent international court to prosecute those responsible for serious violations of international law, said that those remarks reflected the fundamental position of support for the creation of a fair, efficient and effective court. His delegation therefore strongly supported the decision to hold a diplomatic conference in 1998 to finish and adopt the statute of the court.

36. The Preparatory Committee on the Establishment of an International Criminal Court had made important progress in its work. Much, however, still remained to be done. It was necessary to reach agreement to overcome the differences in the various legal systems and approaches in order to fashion a coherent legal and procedural framework for the court. It was essential, by the end of the diplomatic conference in 1998, to reach agreement on the basic rules and principles that would guide the court; that was critical to ensure its effective functioning. Those basic rules and principles must include the fundamental elements of the criminal law procedures of the court. While it was not necessary to elaborate every single rule, it was important to formulate clearly the fundamental outlines of procedure, including the important subject of the rights of defendants, before any State was asked to sign on to the court.

37. It was also essential to clarify and elaborate the rules on the cooperation of States with the court, the powers of the court to enforce cooperation, and the powers of the court to carry out its own investigations. Experience with the International Criminal Tribunals for the former Yugoslavia and Rwanda, for example, demonstrated the essential need for effective rules for the future court.

38. His delegation believed that a clearer definition of crimes was required. Moreover, it was important that initially the court's jurisdiction should be confined to "hard core" crimes, such as genocide, war crimes and crimes against humanity. It was necessary to define more precisely both the crimes and the court's jurisdiction in order to focus more attention on crimes of serious international concern. The court should not concern itself with common crimes, nor should it have to decide what constituted a crime. It was important that the future court should have wide acceptability and a solid basis.

39. Agreement must be reached on the trigger mechanism. There were those who argued that the independence of the court could be assured only if the prosecutor had unfettered authority to initiate cases, without any role for the Security Council or the consent of the States concerned. Others insisted that the consent of various States should be required before a case could be prosecuted before the international criminal court. Curiously, some in both groups appeared to deny the independence of the prosecutor, so as to make him or her the mere instrument for the referral of a case by the Security Council or for an individual State's complaint. His delegation had proposed a procedure which would ensure both the independence of the court and its practical use. That procedure was based on the core concept established by the International Law Commission. The prosecutor should not initiate any case unless the overall situation pertaining to that case had been referred to the court. Once a case had been referred, however, the prosecutor should have the discretion to determine what and whom to investigate and whether or not to prosecute. It was important to bear in mind that the court was an important international mechanism to deal with exceptionally serious situations. It was therefore reasonable to believe that a matter should be of a certain level of seriousness and magnitude before the machinery of the court was set in motion.

40. The overall situation could be referred by the Security Council or by a State concerned, but it should be a question of referring a matter or a situation. A State party should have to refer a situation or a matter; it could not lodge a complaint against one or more individuals, as was currently envisaged in the draft of the International Law Commission.

41. However, if the situation referred by a State party to the international criminal court concerned a dispute or situation pertaining to international peace and security which was being dealt with by the Security Council, the Security Council should have to approve the referral of the entire situation to the court. In that connection, his delegation believed that the responsibilities of the Security Council for the maintenance and restoration of international peace and security under the Charter permitted no alternative to that procedure. The proposal mirrored the practice of the International Criminal Tribunals for Rwanda and the former Yugoslavia. Some regarded those Tribunals as models of the kind of function which an independent prosecutor of the court should have.

42. Another important area which remained to be resolved was that of the structure and administration of the court, including the questions of oversight and financing. After considering the question in recent years, his delegation had come to the conclusion that the court should not be a direct part of, or be administratively dependent on, the United Nations. Linkage with the Security Council was essential since the latter's principal function was the maintenance of

international peace and security. The court should, however, function independently, not only of the Security Council but also of the United Nations. The United Nations had a different objective, a different mission, and its machinery was not designed for a criminal justice institution. To tie the two too closely together would not help the United Nations, nor contribute to the smooth functioning of the court. At the same time, the court would need some mechanism of oversight by States parties. Such a mechanism would allow oversight of financial matters and problems which might arise between the different components of the court and would provide for the approval of any necessary adjustments which might be required, for example, in the rules of procedure.

43. His delegation believed that it was essential that there should be a treaty-based funding scheme. While it was reasonable for the United Nations to make a significant contribution when a situation was referred by the Security Council, it was not acceptable to expect the United Nations to bear the entire cost of the court. That would jeopardize the overall necessary budgetary constraints of the United Nations. Moreover, independence from United Nations mechanisms also entailed fiscal independence.

44. His delegation was committed to the establishment of a fair, effective and efficient court before the next millennium. It also firmly believed that the establishment of an independent court with the necessary powers required the assistance of the Security Council. His delegation was prepared to support a resolution that would confirm and establish plans for the future work of the Preparatory Committee and the diplomatic conference, with a view to the completion of the work on the establishment of an international criminal court.

45. **Ms. Kalema** (Uganda) said that her delegation wished to highlight some of the fundamental issues which it felt needed further elaboration before the Court was set up. First, the Court should be permanent and independent, in order to avoid the need to establish ad hoc tribunals or jurisdictions whenever circumstances so warranted. Second, the principle of complementarity, whereby the International Criminal Court would exercise its jurisdiction only where national legal systems were unavailable or ineffective, should be maintained. Third, while her delegation agreed that the inherent jurisdiction provided for in article 21 of the consolidated draft (A/AC.249/1997/L.8/Rev.1) should be applied to all core crimes and be compatible with the principle of complementarity, it nonetheless felt that in the case of the crime of aggression, the Security Council should first determine whether such an offence had been committed, after which it should be the sole responsibility of the International Criminal Court to adjudicate on individual criminal responsibility, free from any political influence or pressure. Furthermore, the Security Council should not be allowed exclusive power to prevent prosecution and trial by the Court in the particular instances envisaged in article 23(3). Coming back to the crime of aggression, her delegation still believed it to be a very serious offence which deserved the attention of the international community and should therefore fall within the jurisdiction of the Court.

46. Other issues which should be emphasized were the guarantee of the rights of the accused and the creation of an enabling environment that would allow judicial cooperation among Member States in areas such as the provision of witnesses and evidence and the arrest, detention and surrender of accused persons.

47. Lastly, her delegation commended the positive contribution made by non-governmental organizations to the process of establishing the International Criminal Court.

48. **Mr. Kerma** (Algeria) said that he wished to comment on the main provisions of the consolidated draft (A/AC.249/1997/L.8/Rev.1). First, the establishment of an International Criminal Court would dispense with the need to set up ad hoc tribunals to try crimes under international law. Second, the future Court would have to offer all due guarantees of independence and impartiality, but it would be difficult to reconcile that principle with the fact that, on some occasions, the Court would have to defer to the Security Council. Algeria shared the objections raised by many delegations to the idea of giving the Security Council jurisdictional powers, since that would not only seriously undermine the principle of sovereign equality of States but also jeopardize the independence and integrity of the Court. Moreover, Algeria felt that only States that had a justified personal interest in a case should be authorized to lodge a complaint.

49. The principle of complementarity must be compatible with the provisions of the consolidated draft, especially those giving the Court inherent jurisdiction, in order to preserve the primacy of national courts; it must also be compatible with the principle of State consent.

50. Algeria felt that the Court's jurisdiction *ratione materiae* should be extended to acts of terrorism and drug trafficking. Lastly, with regard to procedural issues, the Court would have to offer accused persons the guarantees of due process set forth in the International Covenant on Civil and Political Rights and take into account the world's various legal systems, bearing in mind that its judges would have to be selected on the basis of equitable geographical distribution.

51. **Mr. Robinson** (Jamaica) said that, although the issue of complementarity between the International Criminal Court and national courts was raised formally in the third preambular paragraph and other provisions, such as article 35, of the International Law Commission's draft (A/49/10, sect. II), and although the introductory note to article 35 of the Preparatory Committee's text (A/AC.249/1997/L.8/Rev.1) indicated that the formulation of that article represented a possible way of addressing the issue of complementarity, that issue ran through the entire draft and it was pointless, therefore, to attempt to resolve it by concentrating on one set of provisions. Instead, what was needed was to strike a balance between the various provisions of the draft.

52. With regard to issues of admissibility, his delegation believed that it was better to give the Court a degree of flexibility to develop case law, rather than to tie it down to certain predetermined factors. Accordingly, the better approach would be to leave it to the Court, guided by the third preambular paragraph of the draft Statute, to determine admissibility on the basis either of article 35(2)(a) of the Preparatory Committee's consolidated draft (A/AC.249/1997/L.8/Rev.1), in which case it would have to decide whether the State concerned was unwilling or unable genuinely to carry out the investigation, or of article 35(a) of the Commission's text (A/49/10, sect. II), in which case it would have to decide whether there was any basis for it to take further action. His delegation shared the view that article 35 of the Preparatory Committee's draft and article 42 of the Commission's draft should also encompass cases of discontinuance of prosecution and, possibly, pardons and amnesties. Lastly, he wondered whether article 35 of the consolidated draft should list exhaustively the circumstances in which the Court would make a finding of inadmissibility.

53. With regard to the concept of the inherent jurisdiction of the Court, it had been proposed in the Preparatory Committee that the concept should be interpreted to mean that when a State became a party to the Court's Statute, it would thereby accept the Court's jurisdiction with respect to not just genocide, as the International Law Commission had intended, but all the core crimes. Jamaica was not opposed to that interpretation, but wished to make a number of observations. First, the International Law Commission's rationale for the Court's jurisdiction over genocide had been that the Contracting Parties to the Convention on the Suppression and Punishment of the Crime of Genocide had, in acceding to that instrument, consented implicitly to the Court's jurisdiction over that crime. Jamaica, however, felt that the rationale for the Court's inherent jurisdiction over the other four core crimes should include the fact that they were crimes under international customary law and also certain broad policy considerations, including legitimate claims of the international community as a whole. Second, any decision to give the Court inherent jurisdiction over all the core crimes should take into account the possibility that that might have an adverse effect on participation by States in the treaty establishing the Statute, or even on acceptance of the Statute. In a system where acceptance of the Statute necessarily implied acceptance of the Court's jurisdiction in respect of certain crimes, some States, as custodial and territorial States, might have reservations about accepting the Court's Statute if that meant that their consent would not be specifically required. One alternative would be to make the Court's jurisdiction over certain crimes subject to the prior consent of certain States, for example, custodial and territorial States. The fact that the consent of those States would be specifically required might induce them to accept the Statute. Third, if a system was adopted which required the custodial State's acceptance of the Court's jurisdiction in relation to a specific crime, the Statute would have to stipulate that the State must have acquired custody in accordance with international law. The Court would have to enquire into the circumstances of the custody to ensure that fundamental principles, such as sovereignty and territorial integrity, had not been breached.

54. With regard to the difficult question of the role of the Security Council in relation to the court, it was very probable that the Council, in exercising its powers under Chapter VII of the Charter, could be considering or could have considered a situation related to one of the core crimes which had been presented to the court. In that case a conflict could arise between the political role of the Council and the judicial function of the court. It was important to ensure that the statute guarded against such conflicts, since many States would not support a court which was susceptible to influence by the Council. Even if the membership of the Security Council were to be increased, or if the Council were to be composed of all the Members of the United Nations, a system in which decisions of the Security Council could affect the independence of the court would be unacceptable. The point required further consideration.

55. The main function of the Security Council under Chapter VII of the Charter was set out in Article 39 and, in that context, three questions arose. Should the fact that the Security Council had determined the existence of a threat to peace, a breach of the peace or an act of aggression in a given situation be sufficient to preclude the court from hearing a complaint relating to that situation? Or should it be required that the Council, in addition to having made that determination, should have taken some measures? Or should

the mere fact that the Council had acted under Article 39 bar the jurisdiction of the court? And what if a determination had not yet been made by the Council but was still being considered, or if measures had not yet been adopted by the Council but were being considered? In view of the differing roles of the Council and the court – the one political and the other judicial – it was difficult to understand why, in any of those situations, the court should be barred from intervening.

56. The Statute of the International Court of Justice did not contain any provisions concerning its relationship with the Security Council, and the Court had heard cases which related to situations under consideration by the Council under Article 39 of the Charter. A question therefore arose whether such provisions were necessary in the case of the international criminal court. In the absence of provisions such as those in article 23, paragraphs 2 and 3, of the draft consolidated text, would the court not be able, on the basis of an interpretation of the provisions of the Charter, such as Articles 12, 25 and 39, and relevant case law, to make a determination as to its jurisdiction in relation to the role of the Council?

57. He saw no need to deal with aggression separately in article 23, paragraph 2. Aggression was merely one of the three situations the existence of which the Security Council could determine under Article 39 of the Charter, and the three situations were dealt with in article 23, paragraph 3, of the draft consolidated text. If the rationale for the separate treatment was that the court had no jurisdiction to determine whether a State had committed an act of aggression and that such a determination could only be made by the Council, that was equally applicable to the situation of a threat to the peace and a breach of the peace.

58. His delegation believed that the issue could be resolved on the basis of an approach that would give due weight to the role of the Council in the maintenance of international peace and security and the need to secure the independence of the court.

59. Article 25 *bis* of the draft consolidated text provided that the prosecutor could initiate investigations on the basis of information obtained from any source and decide whether there was sufficient basis to proceed. That proposal was not reflected in the draft statute of the International Law Commission, which took a more conservative approach in limiting the ability to lodge complaints to certain States parties and the Security Council.

60. His delegation thought that that proposal was a bold one and it would continue to consider it since, if it were to be implemented, certain safeguards would have to be built into the statute.

61. Although his delegation had referred in its statement only to core crimes, which constituted the basis of the jurisdiction of the court, it continued to support the jurisdiction of the court in respect of treaty crimes set out in article 20 (e) of the International Law Commission's draft.

62. He expressed his delegation's gratitude to the Preparatory Committee for the work it had done and said it had every confidence that it would provide a good basis for the success of the conference of plenipotentiaries to be held in 1998.

63. **Mr. Orrego Vicuña** (Chile) supported the statement made by the representative of Mexico on behalf of the Rio Group and said that there were three main problems to be resolved if the diplomatic conference to be held in 1998 was to have a successful outcome.

64. The first of those problems was the scope of the court's jurisdiction. The delegation of China, and others, had indicated the proper approach on that point, namely that the jurisdiction of the court should include those crimes which were clearly characterized as such in current international law through precise legal definitions accepted by a large number of States in international conventions or through incorporation in international usage. That criterion would make it possible to eliminate from the current texts many controversial aspects which could be the subject of a future consensus. That applied, in particular, to the crime of aggression. If agreement was reached on an acceptable definition, as appeared to be the case, there would be no obstacle to including it now in the court's jurisdiction; if not, a consensus would have to be reached on a future occasion.

65. The second main problem was that of complementarity. The principle was clearly enunciated that the court should intervene only in the absence of a national judicial system or in cases where a national judicial system was clearly ineffective. What was not clear, however, was how that would be applied in practice.

66. There was a broad range of experience, on other matters, to indicate that the national jurisdiction of a country was acceptable to others in so far as its decisions favoured them, but where that was not the case objections were immediately raised concerning the effectiveness of the system. In order to avoid such a situation, it was suggested that a specific criterion should be established which would confirm the effectiveness of national judicial systems, for example that the acceptance by a State of a national jurisdiction in one instance would prevent that State from questioning it in other instances.

67. The third problem related to the trigger mechanism. That should be a function of the States themselves and could also be a function of the prosecutor, subject to the control machinery that was beginning to be worked out. The possibility that the prosecutor might resort to other sources of information should not be excluded, but he should be subject to even more specific controls designed to ensure that justice was meaningful and timely.

68. The arduous negotiation underlying many peace processes, which called for great care in handling the legal and political alternatives, must not be disrupted by judicial interventions unrelated to the process. That was the framework which should also inspire the relationship between the court and the Security Council. There could be no doubt that the latter had unrelinquishable functions in the exercise of which it might require the intervention of the court, but the problem arose with the possible conflict of jurisdiction between the two bodies. That would happen, for example, if the court ruled that the conditions which had led the Security Council to determine the existence of aggression were not present, or, conversely, that such conditions existed in circumstances which the Council had underrated.

69. Such a conflict of jurisdiction had sometimes been on the point of arising between the International Court of Justice and the Security Council, particularly when preliminary measures were being adopted, and whether decisions of the Security Council were subject to the jurisdictional control of the International Court of Justice was under discussion. It was problems of that kind that needed to be avoided with regard to the International Criminal Court. To that end, two courses of action were possible. The first was for the court to refrain from ruling on a case of specific criminal responsibility while the Council was considering the broader situation which provided its context. The second possibility was for the court to act fully independently of the work of the Security Council and to seek another procedure for settling conflicts of jurisdiction when they arose, for example by means of an advisory opinion of the International Court of Justice. Every indication was that it would be wiser for the time being to proceed with consideration of the first option.

70. **Mr. Briye** (Ethiopia) said that Ethiopia had consistently maintained that the world needed an international judicial body to fill the gap created by the absence of a permanent system of international justice with jurisdiction over crimes against humanity, war crimes and gross violations of human rights.

71. For countries like Ethiopia, whose recent history had been characterized by bloodshed and gross violations of human rights, justice and respect for the law had no substitute. Currently, Ethiopia was going through an important historical phase in which it was bringing to justice those who had committed crimes against humanity and war crimes while they were in power in the country in the 1970s and 1980s. It was against that background that Ethiopia viewed the establishment of the International Criminal Court as an important complement to national jurisdiction in protecting mankind against unbridled dictatorship, abuse of human rights and violation of humanitarian law.

72. The last two sessions of the Preparatory Committee had been dealing with the most crucial elements in the process of negotiating the establishment of the international judicial body. One of those issues was that of complementarity, and in that respect, Ethiopia reiterated its position that the court should be complementary to national jurisdictions, not a substitute for them or a body with appellate jurisdiction over them.

73. The international criminal court was needed not because it was better than national criminal jurisdictions, but in order to prevent gross human rights violations going unpunished in situations where there was no viable constitutional order or central authority capable of halting them.

74. Recent events in Ethiopia demonstrated that, given the necessary material and judicial assistance, national courts could investigate, prosecute and adjudicate many complicated crimes associated with large-scale disregard of human dignity over decades. Ethiopia's experience demonstrated the effectiveness of national jurisdictions in prosecuting heinous crimes in the society against which they were perpetrated.

75. Unquestionably, the issue of jurisdiction would continue to be a core aspect of the future statute of the court. His delegation was pleased to note that the Preparatory Committee, in the decisions taken at its February 1997 session, had paid attention to the views of many countries, including Ethiopia, regarding the categories of crime that should be the focus of the court's jurisdiction. Ethiopia welcomed the approach to defining crimes taken by the Preparatory Committee in document A/AC.249/1997/L.5. Nevertheless, the complexity of the task of defining crimes such as "aggression" warranted further elaboration by the Preparatory Committee so as to minimize the grey area that existed between the legal and political elements of the definition of the crime of aggression, which in his

delegation's view was not susceptible of sufficiently clear legal definition.

76. The crime of terrorism had not yet been given the attention it deserved. At previous sessions of the Preparatory Committee, crimes of terrorism had been discussed only conditionally and in very general terms. His delegation believed that the global dimension of international terrorism and the challenge it posed to peace justified its inclusion in the statute of the court. If it was not included in the jurisdiction of the court, momentum might be lost, with the consequence of compromising peace, stability and development.

77. In Ethiopia's view, the relationship between the court and the Security Council should be seen in the context of a careful consideration and understanding of the nature and mandates of the two bodies. The political nature of the Security Council's actions must be borne in mind, as well as its involvement in matters closely related to the jurisdiction of the court. The relationship between the court and the Council should be clearly defined and agreed upon, taking into account the need to preserve the impartiality and efficient functioning of the court, and above all its judicial independence and credibility.

78. The accomplishments of the Preparatory Committee demonstrated that progress was being made towards the goal of establishing an international criminal court. At its remaining sessions, the Preparatory Committee should continue to consider such important matters as jurisdiction and acceptance of jurisdiction, crimes of terrorism and procedural matters. In view of the accomplishments to date, his delegation believed that the pending issues could be resolved before the diplomatic conference in Rome.

79. **Mr. Ka** (Senegal) said that the ideal of justice and peace embodied in the Charter of the United Nations imposed on Member States a collective obligation to guarantee and, through appropriate means, ensure respect, for the fundamental norms and values that governed life in society, prominent among which were the rights to life, freedom, dignity and security. When those universal values were violated, the international community had a duty to identify those responsible, try them and punish them in a manner commensurate with the seriousness of their crimes. History demonstrated that if they went unpunished, violations of the law and of freedoms created dangerous precedents that gave rise to still greater abuses. That was why Senegal firmly supported the establishment of an international criminal court. The culmination of the process under way would consolidate the progress already made in that direction with the establishment of the courts for the former Yugoslavia and Rwanda. The establishment of a permanent court would constitute not only a powerful means of deterring the so-called "universal" crimes, but also a significant contribution to the work of codification and progressive development of international law.

80. Citing an eminent defender of the humanitarian cause, he recalled that impunity deprived societies disorganized by bloody conflicts of the three fundamental pillars on which they could be rebuilt: memory, reconciliation and justice. The establishment of an international criminal court was simultaneously a moral imperative, a historic duty and a debt of honour against impunity.

81. As a token of its support for plans to establish the court, Senegal would host, in January and the beginning of February 1998, the African regional preparatory meeting for the 1998 Rome diplomatic conference.

82. The Preparatory Committee's August session had clearly shown the steps that needed to be taken to reach a consensus on such basic questions as the jurisdiction of the court, the definition of the crimes, the general principles of international criminal law, complementarity between the court and national jurisdiction, the rights of the accused, the relationship between the court and the Security Council and other procedural rules chiefly related to the activating mechanisms and the powers of the prosecutor. At the December session, the Committee should adopt a pragmatic criterion and concentrate on formulating concrete proposals on those issues in order to make headway in the negotiations bearing in mind the Rome conference.

83. His delegation was convinced that it was possible to reach a consensus on the aforementioned questions if the spirit of compromise continued to be the common goal. In the final analysis, the international criminal court would be established from a skilful combination of the rules and procedures of the various legal systems. That essential factor should be borne in mind during the preparations, but it should not pose an obstacle to efforts to reach a consensus, since diversity was a source of richness and complementarity. The only possible option was to continue to move forward in order to ensure that crimes against humanity and other heinous acts, whoever their perpetrators and in whatever circumstances they were committed, would never again go unpunished.

84. **Mr. Wilmot** (Ghana) said that Ghana vigorously supported the establishment, through a multilateral treaty, of an international criminal court as an independent judicial body. The court must not be a supervisory body in criminal jurisdiction; it must complement, not supplant, national jurisdiction. However, in cases where national jurisdiction

did not exist or was ineffective, the court must cooperate with national bodies. The court's jurisdiction should initially be confined to the crime of genocide, war crimes and other serious violations of international law. However, it should be possible to widen the scope of the court's jurisdiction once it had consolidated its operations.

85. In accordance with the principle of legality, it was necessary to establish precise definitions of crimes and proscribed conduct. If a crime had been adequately defined in other instruments, it might not be necessary to redefine it. For example, the definition of genocide as contained in articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly on 9 December 1948, should suffice for the purposes of the international criminal court, which was expected to enforce universally recognized law.

86. While it should be possible for the Security Council to refer cases to the court, his delegation considered that article 23, paragraph 3, which vested the Security Council with power to stop prosecution in certain situations, might compromise the principle of judicial independence. Obviously, the Council's role in the maintenance of international peace and security must be preserved at all costs, but that should not be at the expense of the principle of judicial independence. The Council's political influences must not be allowed to undermine structures established with the objective of dispensing justice. It was of absolute importance to maintain the credibility and independence of the court in all situations.

87. With regard to the complaint system provided for in article 25 of the draft statute, he noted that there was a complaint procedure for genocide and another for the other core crimes, which introduced unnecessary procedural complications, since the distinction between genocide, war crimes and crimes against humanity was not so clear and, in some situations, those concepts overlapped. Furthermore, it would be necessary to expand the complaint regime in keeping with the universal nature of international crime, since the current regime was too restrictive. Within appropriate procedural safeguards stipulated in the draft statute, the prosecutor should be empowered to initiate investigations where there was evidence to suggest that crimes falling within the jurisdiction of the court had been committed.

88. There was a need for further clarity with respect to the issue of on-site inspections as provided for in article 26, paragraph 2, of the draft statute. A distinction must be made between State cooperation with respect to investigations taking place in its territory, and other acts by a State in connection with an investigation that could be construed to be attempts to supervise the investigation. Ghana fully supported the view that the credibility of an on-site investigation and of the evidence obtained from such an investigation was best guaranteed by preventing States from supervising investigations in any way.

89. Issues relating to the rights of suspects and accused persons also deserved serious attention. Those issues might have linkages to the willingness of States to surrender their citizens and other suspects to the court. The dichotomy between the two sets of rights provided for in articles 26 and 41 did not serve any meaningful purpose from a legal standpoint. A merger of both sets of rights into one article would provide an appropriate framework for a detailed discussion of those rights and their linkages to different stages of the trial procedure.

90. International cooperation and judicial assistance must involve all actors on the international scene, including non-governmental organizations. In the light of recent experience, the issue of cooperation must be addressed in a way that went beyond the language contained in the draft statute. Otherwise, there would be no solid foundations on which to establish the new structures. The energy and effort expended by the international community must not encounter a wall of recalcitrance and obstinacy.

91. **Mr. Szénási** (Hungary) said that history had clearly shown that there could be no peace without justice. Hungary was convinced that bringing to justice those who committed the most heinous international crimes was an important contribution to the maintenance of international peace and security and to the protection of human rights. The timeliness of implementing that principle was shown by the war crimes and other grave violations of international humanitarian law that had been committed during the past few years in various parts of the world.

92. Hungary, which was a country that neighboured one of those areas, had welcomed the Security Council's decision to set up ad hoc tribunals for the former Yugoslavia and Rwanda, and had always given its full support to their activities. It had also attached particular importance to the establishment of an international criminal court by means of a multilateral treaty. The court would operate on an unequivocal legal basis and could rely on the experience gained from the two ad hoc tribunals. The court would have advantages over the two tribunals: it would guarantee equal treatment for all violations wherever and by whomever they were committed; it would exercise its jurisdiction without any undue delay that might be caused by the need to establish ad hoc tribunals; it would make use of the special

expertise of its permanent staff; and it would eliminate the need for the Security Council to set up ad hoc tribunals with respect to particular conflicts.

93. The idea of creating a permanent international judicial system had been on the agenda of United Nations bodies since the end of the Second World War. At the outset, progress had been very slow. Nevertheless, the recent positive changes and developments in international relations had paved the way for a wider acceptance of the notion of individual criminal responsibility. The atrocities committed during recent conflicts and the existence of the two ad hoc tribunals had also helped to accelerate the process that would culminate in the holding of the diplomatic conference of plenipotentiaries.

94. His delegation supported the adoption of a resolution establishing the exact date, length and venue of the conference; it was committed to pursuing the negotiations, and would continue to do its utmost at the two remaining sessions of the Preparatory Committee and the diplomatic conference in Rome to ensure the establishment of an independent and genuinely effective international criminal court.

95. **Mr. Aass** (Norway) said that the establishment of an international criminal court would be instrumental in providing a judicial response in cases where gross violations of human rights occurred and national jurisdictions proved inadequate. An international criminal court could contribute to peace-building and the process of reconciliation in the aftermath of armed conflict and could help to re-establish the rule of law.

96. His Government believed, first, that it was of the utmost importance for the criminal court to have broad-based support and participation from Member States. That was essential to guaranteeing its legitimacy and effectiveness. The increasing number of delegations which contributed actively to the work of the Preparatory Committee was thus encouraging. The establishment by the Secretary-General of a trust fund to facilitate the participation of the least developed countries in the Preparatory Committee and in the conference was important in that context. His Government had contributed to the fund and it encouraged as many States as possible to make such contributions.

97. Secondly, in order for the court to function effectively, its jurisdiction should be limited to the most serious international crimes, especially genocide, crimes against humanity and war crimes. Nevertheless, a certain number of years after the statute had entered into force, other crimes could be included in it on the basis of a review clause.

98. Thirdly, the court should have jurisdiction to try such crimes in the absence of effective national mechanisms for prosecuting those responsible. His delegation fully endorsed the formula worked out in the Preparatory Committee concerning complementarity between the court and national jurisdictions. It was to be hoped that similar progress could be achieved in the near future on the issue of triggering mechanisms, including the relationship between the court and Security Council.

99. His delegation was confident that in the remaining sessions of the Preparatory Committee it would be possible to consider a list of clear options to be settled at the diplomatic conference. It was to be hoped that the December session would bring clarity on several topics, including the definition of war crimes, State cooperation and the choice of applicable penalties.

100. **Ms. Mekhemar** (Egypt) said that the Preparatory Committee had made considerable progress with regard to the definition of crimes, the principles of criminal law, complementarity, the triggering mechanism and penal proceedings.

101. Her delegation believed that the court should have jurisdiction over four categories of crimes – war crimes, crimes against humanity, genocide and aggression – and that they should be dealt with on an equal basis. She stressed the necessity of including the crime of aggression in the court's jurisdiction, and expressed the hope that the members of the Preparatory Committee would reach an agreement on the definition of that crime, bearing in mind, in particular, that the deliberations of delegations were based on legal instruments adopted at the international level.

102. With regard to the principle of complementarity, it was recognized, in accordance with that principle, that the court functioned in a manner complementary to, and not as a substitute for, national judicial systems; in other words, the court would not exercise its jurisdiction unless national courts confirmed that they were not in a position to exercise it. She further commended Canada on its efforts to achieve a conciliatory text on the issue of the grounds for inadmissibility of a complaint. Nevertheless, she did not believe it was necessary to include a special article on complementarity in order to establish a principle which constituted the key element of the statute.

103. With regard to the importance of the prosecutor's role and the triggering mechanism, the role of the prosecutor had a direct impact on the court's effectiveness. She reaffirmed the need for the prosecutor to be independent and immune to political pressures and trends. That could be achieved only if the prosecutor had the power to initiate a proceeding ex

officio, but the prosecutor should not have sole authority to do so. States should also be empowered to refer cases to the court through the prosecutor.

104. With regard to the relationship between the court and the United Nations, especially the Security Council, her delegation reaffirmed its reservations concerning the interference of the Security Council, a political body, in the work of the court, a judicial body, in view of the legal and practical difficulties to which that would give rise. She was convinced that the basic statute of the court should not be divorced from international political reality. Accordingly, she had given careful consideration to the proposed formulas for regulating that relationship, especially the possibility that the Council could refer to the court cases relating to the crime of aggression, bearing in mind the role of the Security Council in the maintenance of international peace and security, and that the court would be responsible for determining the nature of the crime and punishing the guilty. As to the question raised in the Preparatory Committee concerning cases in which the Security Council abstained from taking measures when faced with a situation of aggression, her delegation believed that the Council's decision should not in any way affect the impartiality of the court. The Council frequently adopted decisions on the basis of political considerations. In any case, whatever the role that might be assigned to the Council, it should not influence the functioning of the court as an impartial body or hamper its work.

105. Her delegation expressed satisfaction at the Secretary-General's decision to establish a trust fund to enable the least developed countries to participate in the work of the Preparatory Committee and in the diplomatic conference, which would help to confer a universal character on the court.

106. **Mr. Msaka** (Malawi), referring to the future work of the Preparatory Committee, said it should not be forgotten that such work would consist of establishing an international criminal court. Therefore, in order to ensure that the court enjoyed universal acceptance and respect, it should not be modelled completely on the judicial system of a given State. Furthermore, it might not be helpful if Member States attempted to have the court conform to their own circumstances and current needs.

107. His delegation endorsed the general thrust of the draft statute. Furthermore, as a beneficiary of the trust fund established pursuant to General Assembly resolution 51/207, of 17 December 1996, his Government urged Member States to continue to make contributions, so that, as required by the principle of universality, as many developing countries as possible could participate in a process so decisive for the development of international law and international relations. Lastly, he supported the participation of non-governmental organizations in the diplomatic conference to be held in Italy.

108. **Mr. Kawamura** (Japan) said that the establishment of an international criminal court was of historic significance; in order for the court to be universal, effective and enjoy the confidence of the international community, it was essential for its statute to be accepted by many countries and to be realistic. It was especially important to protect human rights, for example, by characterizing crimes clearly, ensuring due process and applying the principle of complementarity to the proceedings of the international criminal court. Lastly, his delegation noted with satisfaction the increasing number of countries participating in the work of the Preparatory Committee, and particularly welcomed the active participation of Asian and African countries.

The meeting rose at 1 p.m.